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No. 86-1101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MCCABE'S FURNITURE, INC.

Petitioner,

v.

LA-Z-BOY CHAIR CO.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent La-Z-Boy Chair Co. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case reported at 798 F.2d 323, for the reasons that:

(1) This case presents solely a question of sufficiency of the evidence in a unique factual context.

(2) Petitioner's argument for application of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is misplaced. Shifting of the bur-

den of proof is inappropriate in this type of case and the legal principle advocated was not presented to either court below.

(3) This case is an inappropriate vehicle to revisit *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), because it turns on unique facts and it comes too soon after the decisions in *Monsanto* and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986).

STATEMENT OF THE CASE

La-Z-Boy is a furniture manufacturing company with its principal place of business in Michigan. It maintains a distribution system consisting of two types of dealers located throughout the United States. Part of La-Z-Boy's sales to consumers are made through what are known as La-Z-Boy Showcase Shoppes, which are independently owned and operated retail outlets devoted exclusively to marketing La-Z-Boy products. Showcase Shoppes enter into written contracts with La-Z-Boy whereby they agree, *inter alia*, to maintain a facility of a certain quality, to advertise the product, and to service it (Tr. 53, 95-96). La-Z-Boy also sells to independent retail furniture stores that are not devoted exclusively to La-Z-Boy products and do not enter into any kind of written contract (Tr. 96).

McCabe's is a retail furniture store in Little Rock, Arkansas. It markets a variety of furniture products manufactured by a variety of manufacturers. It had sold La-Z-Boy products for approximately fifteen years before La-Z-Boy discontinued selling to it in February, 1984 (Tr. 9). According to Fred McCabe, McCabe's

president and sole stockholder, La-Z-Boy and McCabe's had a cordial relationship throughout the fifteen years without any problems other than that on occasion a La-Z-Boy representative stated that McCabe's prices were too low and should be raised (Tr. 9). There was no testimony that La-Z-Boy made threats or took action to force McCabe's to raise its prices.

After it was terminated in February, 1984, McCabe's brought this action in the Eastern District of Arkansas, alleging tersely that La-Z-Boy and unnamed co-conspirators had conspired to fix prices, and that McCabe's was terminated as a part of this conspiracy.

As the facts developed during discovery and at trial, the sole alleged co-conspirator was Cyrus Opferman, who owns and operates a La-Z-Boy Showcase Shoppe in Little Rock, Arkansas (Tr. 52, 137).

Following a one-day trial at which McCabe's called only two witnesses, the jury returned a verdict in favor of McCabe's. La-Z-Boy appealed to the Eighth Circuit on three separate grounds: (1) that McCabe's failed to present sufficient evidence of a conspiracy to fix prices; (2) that the District Court erred in refusing to instruct the jury in accordance with *Monsanto*; and (3) that the award of damages was contrary to the evidence and excessive as a matter of law. The Eighth Circuit reversed and dismissed on the basis of insufficient evidence and therefore did not address the jury instruction and damages issues.

The issue at trial concerned the reasons for La-Z-Boy's termination of McCabe's. Fred McCabe, McCabe's president, admitted that he had no direct

knowledge of why he was terminated. Over La-Z-Boy's hearsay objection, McCabe was permitted to testify that when he asked a local La-Z-Boy salesman, "He said he didn't know, that the only reason he could think of that they were terminating me is to give the La-Z-Boy Shoppe some relief" (Tr. 11-12). McCabe also testified that his store was medium priced and not a low end store nor a high end store. He testified that the store had carpet in the dining room department, the TV department, and the front windows. The store had accessorization but not vignetting (Tr. 6-9).

McCabe's called Cyrus Opferman, the alleged co-conspirator, as an adverse witness. Opferman testified that he had complained to La-Z-Boy about McCabe's and another distributor, Crafton's, because they were, in Opferman's term, "freeloaders." Opferman testified that he was advertising the La-Z-Boy product extensively, but that McCabe's did not advertise the product at all. He also testified that he serviced the product, while McCabe's did not. In fact, in order to protect the La-Z-Boy reputation, he serviced McCabe's customers. Opferman testified that he displayed the product in proper settings, which McCabe's did not. He also testified that La-Z-Boy was not capturing an adequate share of the Little Rock market because of the lack of effort from other dealers besides himself (Tr. 55-58, 65-67).

Patrick Norton, who became vice president of sales for La-Z-Boy in 1981, testified in La-Z-Boy's case in chief. Norton testified that in 1981, La-Z-Boy's sales had been in decline for several years (Tr. 82). To reverse that trend, Norton instituted a new marketing system for the 202 largest metropolitan trade areas,

which included Little Rock. In those places, La-Z-Boy wanted one showcase shoppe plus distribution through what Norton called "quality or first-line general furniture store operations" (Tr. 88). That program has been successful and has reversed La-Z-Boy's decline (Tr. 89).

Despite the fact that La-Z-Boy's sales increased from 1981 to 1983 nationally, its sales continued to decline in Little Rock (Tr. 92). Mr. Norton made the determination that McCabe's marketing philosophy did not coincide with La-Z-Boy's marketing philosophy and therefore terminated McCabe's in February, 1984 (Tr. 107).

SUMMARY OF ARGUMENT

This case is not worthy of Supreme Court review because it presents only factual issues. The Eighth Circuit's opinion follows the governing Supreme Court case, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and applies the proper standard of review for the sufficiency of the evidence. There is no conflict between the Eighth Circuit opinion in this case and opinions in other circuits. Petitioner's argument that the Court should adopt a new standard for the shifting of the burden of proof is inapposite to this type of case and was not submitted to either court below. This Court should not revisit *Monsanto*, if at all, until the Courts of Appeal have had the opportunity to apply and evolve its standards in a broad range of cases.

ARGUMENT

1. This Case Presents Solely a Question of the Sufficiency of the Evidence in a Unique Factual Context.

Contrary to McCabe's assertions, this appeal raises no important issues of law; the decision below turned solely on the sufficiency of the evidence. The Eighth Circuit did not depart from this Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), nor did that court adopt a new legal standard precluding the trier of fact from determining disputed issues. There is no extreme procedural error to be corrected, nor does the court's opinion conflict with the decisions of other circuits.

The Eighth Circuit properly held that in reviewing the denial of a motion for judgment notwithstanding a jury verdict, it must view the evidence and all reasonable inferences in the light most favorable to the party who prevailed before the jury. In so doing, the court recognized that it was required to:

> (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting -the nonmovant which the evidence tends to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

798 F.2d at 327, quoting *Dace v. AFC Industries, Inc.*, 722 F.2d 374, 375 (8th Cir. 1983), modified *per curiam*, 728 F.2d 976 (8th Cir. 1984).

The Eighth Circuit also recognized the controlling authority of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). The court discussed that decision

at great length and used that decision as the standard for reviewing the sufficiency of the evidence. As the court noted, the exchange of information between a manufacturer and a distributor does not automatically make the manufacturer's subsequent termination of a competing distributor part of a conspiracy:

> In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), a dealer termination case like this one, the Supreme Court set forth the evidentiary requirements to create a jury issue as to the existence of a vertical conspiracy. The Court held that proof that a manufacturer terminated plaintiff's dealership following, or even in response to, complaints by competing dealers, is legally insufficient to support a jury finding of concerted action. The Court reasoned that a manufacturer and dealer have many legitimate reasons for exchanging information about marketing activities; to impose liability because a manufacturer acted on information originating as a dealer complaint, or based on other "highly ambiguous evidence," would deter commercially useful communications. *Id.* at 763-64. The Court thus ruled that to get to the jury, "something more * * * is needed." *Id.* at 764. The plaintiff must present direct or circumstantial evidence that "reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Id.* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert.*

> *denied*, 451 U.S. 911 (1981)). "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.* The Supreme Court recently emphasized this aspect of the *Monsanto* standard in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), stating that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 1357.

798 F.2d at 327-28.

The Eighth Circuit articulated the relationship between concerted action to maintain resale prices, which is unlawful per se, and concerted action to impose vertical nonprice restrictions, which is subject to the rule of reason. This distinction, the court emphasized, is critical in evaluating the evidence:

> Because of this distinction, as post-*Monsanto* authority recognizes, for a terminated dealer to prevail on its per se claim, the evidence must be sufficient for the jury to determine not merely that the manufacturer and nonterminated dealer conspired, but that they conspired to maintain resale prices. * * * In this case, the distinction is crucial, since McCabe's neither pleaded a nonprice theory nor presented evidence that the agreement pursuant to which it was terminated unreasonably restrained competition.
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> * * *
>
> When faced with conflicting evidence, the

> jury must determine whether the nonprice justifications for the termination advanced by the defendant are legitimate, or are mere pretext to disguise a per se illegal agreement with the nonterminated dealer to maintain resale prices. It is the court's duty under *Monsanto* to decide whether sufficient evidence was presented for a jury to make that determination.

798 F.2d at 329 (citations omitted).

Finally, the Eighth Circuit observed that this Court in *Monsanto* held that a manufacturer's concern with resale prices does not automatically make concerted action per se unlawful:

> [I]t is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices. The manufacturer will often want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of a product, and will want to see that "free-riders" do not interfere. * * * Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the [law] allows.

Monsanto, 465 U.S. at 762-63 (citations omitted), *quoted in* 798 F.2d at 330.

McCabe's takes no issue with the Eighth Circuit's articulation of the law. It argues only that in its view,

the evidence of a conspiracy to fix prices was sufficient to get to the jury, whereas the Eighth Circuit disagreed. It is hardly surprising that a litigant would disagree with an appellate court which set aside a jury verdict in the litigant's favor. That understandable dissatisfaction, however, does not create a case appropriate for review by this Court.

McCabe's argument for certiorari is wholly predicated upon a biased, incomplete, and inaccurate rendition of the evidence presented at trial. Although McCabe's contends that there was a genuine factual dispute concerning whether La-Z-Boy had legitimate reasons for terminating it, in fact there was no genuine dispute, and the evidence is overwhelming that La-Z-Boy had ample nonprice justification for its decision.

McCabe's presented only two witnesses. One of those was the alleged co-conspirator, Cyrus Opferman. Opferman testified that he had, indeed, complained about McCabe's being a freeloader. He testified that McCabe's provided no advertising for La-Z-Boy products, nor did McCabe's service the La-Z-Boy products it sold. Opferman was forced to "carry the ball" for McCabe's in this regard. Furthermore, Opferman testified that he complained because McCabe's did not properly display the product. He also testified that because of the lack of effort from McCabe's, La-Z-Boy was not penetrating the Little Rock market.

All of this testimony was presented in McCabe's case by a witness called by McCabe's. None of it was rebutted. Fred McCabe did not testify that he ever advertised La-Z-Boy products, nor did he testify that he ever serviced any of the La-Z-Boy products he

sold. Likewise, he never testified as to the manner in which he displayed the La-Z-Boy products.

Patrick Norton, vice president of sales for La-Z-Boy, testified that beginning in 1981, La-Z-Boy initiated a nationwide program of terminating distributors that were not of the sort to attract customers who could pay the comparatively high prices charged for La-Z-Boy's high quality products. The effort had been made to begin distributing La-Z-Boy products through distributors that were of the highest quality in each area. This program had succeeded in reversing La-Z-Boy's declining sales. In the Little Rock market, however, La-Z-Boy's sales had continued to decline. Norton testified that McCabe's was not a high quality store and not in a high quality location, that McCabe's did not advertise the product and did not properly display it. All of this, again, was undisputed. Furthermore, photographs of McCabe's store were introduced into evidence and available for the Eighth Circuit to review.

In light of the undisputed fact that McCabe's did not advertise the product, did not service the product, did not display it properly and, in Opferman's term, was a "freeloader," the Eighth Circuit appropriately concluded that the evidence that the termination was part of a conspiracy to fix prices was "highly ambiguous" and insufficient under *Monsanto* to support a finding of per se illegality.

There is no conflict between the Eighth Circuit's opinion in this case and the two post-*Monsanto* decisions of other circuits cited by McCabe's.[1] The Fifth

[1] McCabe's inexplicably also cites a pre-*Monsanto* decision, *Zidell Explorations, Inc. v. Conval International, Ltd.*, 719 F.2d

Circuit in *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212 (5th Cir. 1986), *petition for cert. filed*, No. 85-1910 (May 21, 1986), reversed a judgment for the plaintiff dealer on grounds virtually identical to the reasoning of the Eighth Circuit below. The Third Circuit's decision in *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469 (3d Cir. 1985), involved a motion for summary judgment, not the sufficiency of evidence presented at trial. McCabe's also contends that the decision in this case is inconsistent with another Eighth Circuit decision, *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466, 468-9 (8th Cir. 1985). McCabe's made this same argument in its petition for rehearing *en banc* to the Eighth Circuit, but the Eighth Circuit unanimously denied the petition.

Nor is the decision below contrary to congressional intent. Neither the "Vertical Restraint Guidelines" nor Pub. L. 605, 99-180, deal with the sufficiency of evidence. Since the sufficiency of the evidence is the only issue presented here, there is no conflict between the Eighth Circuit decision and congressional intent.

2. Shifting of the Burden of Proof is Inappropriate in Antitrust Cases and the Legal Principle Advocated Was Not Presented to Either Court Below.

Petitioner's argument with respect to the burden of proof was not presented either to the District Court or to the Eighth Circuit; nor was the case upon which petitioner relies, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), even cited by petitioner to either court below. An issue not presented below may not

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1465 (9th Cir. 1983), which applied a standard rejected by this Court in *Monsanto*.

ordinarily be raised before this Court. *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982).

Further, *McDonnell Douglas* is inapposite. In that case, this Court pronounced standards for proof of a prima facie case of race or sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and held that once such proof has been presented, the burden of proof shifts to the defendant. Such a shift in the burden of proof has never been applied to antitrust cases.

Furthermore, application of such a procedure to dealer termination cases would *sub silentio* overrule *Monsanto*. This Court in *Monsanto* chose the more stringent among competing standards for prima facie proof of a per se Section 1 Sherman Act violation. It expressly rejected the more liberal price complaint standard applied by the Seventh Circuit. The Eighth Circuit determined that this case does not meet the applicable standard. It made no procedural error. To reverse the Eighth Circuit by application of *McDonnell Douglas* would be to abandon *Monsanto*.

3. This Case is an Inappropriate Vehicle to Revisit Monsanto Because it Turns on Unique Facts and it Comes Too Soon After the Monsanto Decision.

Monsanto is a major contribution to the antitrust jurisprudence, imposing standards for trial courts to winnow among dealer termination cases. Before this Court revisits that precedent, it should have the benefit of a wide variety of adjudications under its standards. The instant case not only comes too soon for this Court to realize the benefits of this process, but it also presents only a fact weighing issue. It does

not present a suitable backdrop for a contribution to antitrust jurisprudence.

CONCLUSION

As this case is presented by the petitioner, it presents only an issue concerning the sufficiency of the evidence. This is not an appropriate case for Supreme Court review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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